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## Diana's Law, Celebrity and the Paparazzi: The Continuing Search for a Solution, 18 J. Marshall J. Computer & Info. L. 945 (2000)

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# DIANA'S LAW, CELEBRITY AND THE PAPARAZZI: THE CONTINUING SEARCH FOR A SOLUTION

by RICHARD J. CURRY, JR.†

It was a week and a half after my heart surgery and I wasn't even driving. My wife, she was driving the car, and they (paparazzi) cut her off and told her she couldn't go anywhere, any more and they started filming. They had to be put in jail because they lost the lawsuit. The prosecutor went after them and the judge said they were guilty and had committed a crime.

Arnold Schwarzenegger, Nov. 11, 1998  
(on why he sued the tabloids).

There were helicopters buzzing around. . .my moment wasn't as peaceful as I thought it would be. We had a decoy bride and groom. We tried everything. . .we did what we could with the knowledge that it still would be intruded upon, but that we did all we could and at least we could go on from there.

Brooke Shields, May 15, 1997 (describing tactics taken to avoid paparazzi coverage at her wedding).

There is no doubt that she was looking for a new direction in her life at this time. She talked endlessly of getting away from England mainly because of the treatment that she received at the hands of the newspapers. I don't think she ever understood why her genuinely good intentions was smeared by the media, why there appeared to be a permanent quest, on their behalf, to bring her down. It is baffling. My own and only explanation is that genuine goodness is threatening to those at the opposite end of the moral spectrum. It is a point to remember that of all the ironies about Diana, perhaps the greatest was this—a girl given the name of the ancient goddess of hunting was, in the end, the most hunted person of the modern age.

Charles Spencer, Princess Diana's brother's remarks about the press at Princess Diana's funeral said at the Oprah Winfrey Show, May 25, 2000.

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## I. INTRODUCTION

Celebrities and the media possess a unique relationship. Many celebrities skillfully use the media to market and advertise their movies, television shows, books, and records. They use the media to propel their careers and create a marketable celebrity image. Society is celebrity crazed and magazines, tabloids and other media forms such as Entertainment Tonight and Access Hollywood have combined to feed that craze. Our society's hunger for celebrities has spawned the existence of photographers known as the paparazzi. Armed with zoom lenses, high-powered microphones, and the promise of huge cash rewards for an exclusive celebrity expose, the paparazzi have become more intrusive and aggressive than ever in their pursuit of private celebrity information.

The public outcry following the tragic August 1997 death of Princess Diana and her boyfriend Dodi Fayed as they attempted to out run a group of aggressive paparazzi has led to a backlash against the paparazzi and the press.<sup>1</sup>

Prompted by personal stories from celebrities about aggressive paparazzi photographers both the State and Federal legislators have introduced legislation to regulate paparazzi conduct.<sup>2</sup>

This Comment focuses on whether anti-paparazzi legislation introduced at the federal level and the State of California laws are necessary in light of the existing laws. The first section of this paper reviews common law privacy torts. The second and third sections examine proposed federal legislation and California statute that eradicates intrusive paparazzi behavior. The fourth section examines the constitutionality of proposed federal legislation and California law. Finally, this Comment concludes that these statutes are not necessary given existence of laws that effectively deal with abusive paparazzi behavior.

## II. PRIVACY PROTECTION IN THE UNITED STATES

The common law right of privacy was first articulated in an 1890 article entitled, *The Right of Privacy* written by Samuel Warren and Louis Brandeis.<sup>3</sup> The article criticized the newspaper enterprise for invading the sacred precincts of domestic life.<sup>4</sup> The authors noted that cameras and other mechanical devices promise to make what is whispered in the closet available to the public, thus, the concept of "the right

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1. See Lena Reed VanHoornbeck, *Protection From Paparazzi: Possible or Preposterous?* 17 ST. LOUIS U. PUB. L. REV. 203, 205 (1997).

2. See *Privacy, Technology and the California Anti-Paparazzi Statute*, HARV. L. REV. 1367, 1368 (1999) [hereinafter *Privacy*].

3. See Samuel Warren and Louis Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193; see generally Restatement (Second) of Torts § 652A cmt. A (1977).

4. See *id.*

to be let alone" was conceived.<sup>5</sup>

Some seventy years later Dean Prosser noted that there were four common law privacy torts that were actionable against the private sector.<sup>6</sup> The first privacy tort is public disclosure of private facts.<sup>7</sup> Under this privacy tort, "one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion"<sup>8</sup> if: (a) the personal information is not generally available or visible to the public; (b) the personal information relates to one's private life; and (c) the disclosure "would be highly offensive to a reasonable person."<sup>9</sup>

The second privacy tort is publicly placing a person in a false light.<sup>10</sup> Essentially, this tort states:

one who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of . . . privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the [person] had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.<sup>11</sup>

The third privacy tort is the misappropriation of an individual's name or likeness for commercial purposes.<sup>12</sup> Under this privacy tort, an individual's name or likeness must be misappropriated and used in a commercial context without their permission or consent.<sup>13</sup>

The fourth privacy tort is the intrusion upon another's seclusion.<sup>14</sup> Under intrusion upon seclusion, an individual is protected from improper conduct in connection with the gathering of personal information.<sup>15</sup> For a violation to occur under this tort there must be an intentional intrusion upon a person's solitude or seclusion that would be construed as highly offensive by a reasonable person.<sup>16</sup> Courts hold al-

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5. *See id.*

6. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960); *see also* Restatement of Torts (Second) § 652A cmt b.

7. *See* Restatement (Second) of Torts § 652D (1977).

8. Restatement (Second) of Torts § 652D (1977).

9. Restatement (Second) of Torts § 652D; *see also* Susan E. Gindin, *Lost and Found in Cyberspace: Informational Privacy in the Age of the Internet*, 34 SAN DIEGO L. REV. 1153, 1189 (1997).

10. *See* Restatement (Second) of Torts § 652E (1977).

11. Restatement (Second) of Torts § 652E (1977); *see also* Gindin, *supra* note 9, at 1192.

12. *See* Restatement (Second) of Torts § 652C (1977).

13. *See* Restatement (Second) of Torts § 652C cmt. b (1977).

14. *See* Restatement (Second) of Torts § 652B (1977).

15. *See* Restatement (Second) of Torts § 652B (1977).

16. *See* Restatement (Second) of Torts § 652B, cmt. a (1977).

most universally that this tort cannot occur in a public place.<sup>17</sup> As a general rule, an individual out in public has no right to be alone and it is not an intrusion upon privacy should another do no more than follow another person about their daily activities.<sup>18</sup> Likewise, there is no intrusion upon that person's seclusion should another individual photograph that individual in the public place.<sup>19</sup> The rationale being that this amounts to no more than making a record of the event and this does not differ from a full written description that anyone in public sight would be free to make.<sup>20</sup>

### III. PROPOSED FEDERAL LEGISLATION

Stressing the national scope of the paparazzi problem, proponents of stricter privacy turned their attention to Congress to enact a solution.<sup>21</sup> The (late House Representative Sony Bono (R-CA) introduced the first proposed bill on September 10, 1997.<sup>22</sup> Bono's bill, entitled the Protection From Personal Intrusion Act, ("PFPIA") was designed provide protection from personal intrusion for commercial purposes.<sup>23</sup> The bill established criminal and civil liability for members of the media who engaged in violent behavior such as stalking, harassment, and assault in an effort to obtain a photograph or recording with the intent to broadcast, publish or sell the photograph or recording.<sup>24</sup> The bill would amend Chapter 89 of Title 18 of the United States Code, by adding the following:

Definition of 'Harass'—As used in this section, the term harass means persistently physically following or chasing a victim, in circumstances where the victim has a reasonable expectation of privacy and has taken reasonable steps to insure that privacy, for the purpose of capturing by a camera or sound recording instrument of any type, a visual image, sound recording or other physical impression of the victim for profit in or affecting interstate or foreign commerce.<sup>25</sup>

Under the proposed Bono bill, a defendant would not be allowed to raise the defense that no image or recording was captured or sold for

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17. See Andrew McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability For Intrusions in Public Places*, 73 N.C. L. Rev. 989, 1025 (1995).

18. See *id.*; see also Restatement (Second) of Torts § 652B cmt. c (1977).

19. See McClurg, *supra* note 17, at 1025.

20. See *id.*

21. See Andrew D. Morton, *Much Ado About Newsgathering: Personal Privacy, Law Enforcement, and the Law of Unintended Consequences for Anti-Paparazzi Legislation*, 147 U. Pa. L. Rev. 1435, 1450 (1999).

22. See Larysa Pyk, *Putting the Brake on Paparazzi: State and Federal Legislation Propose Privacy Protection Bills*, 9 DEPAUL-LCA J. ART & ENT. L. 187, 195 (1998).

23. See *id.*

24. 143 Cong. Rec. E1 709-01 (September 10, 1997) (Statement of Rep. Bono).

25. H.R. 2448, 105th Cong. (1997).

profit.<sup>26</sup> Moreover, in the event that death resulted from the harassment, a minimum sentence of twenty years could be imposed as well as a monetary fine.<sup>27</sup> If bodily injury results, the defendant faces a minimum of five years plus a fine.<sup>28</sup> If neither death nor bodily injury occurred from the defendant's violation, the penalty could result in imprisonment for a maximum of one year plus a fine.<sup>29</sup> Furthermore, victims would be allotted a civil action against the defendant.<sup>30</sup> However, no cause of action would exist for the sale, transmission, publication, broadcast, or use of an image that was made in a lawful manner.<sup>31</sup> Unfortunately, the bill fails to define what is lawful. Similarly, the bill includes an exemption for legitimate law enforcement activities, yet fails to provide a definition for legitimate activities.

Similar to Bono's PFPIA, the Privacy Protection Act of 1998 ("PPA"), proposed by Representative Elton Gallegly (R-CA), contains a similar harassment definition. Yet, the PPA harassment definition differs from the PFPIA in that a person is liable for harassment if the image, recording or impression was intended, or attempted to be sold, published, or transmitted in interstate commerce, or obtained for commercial purposes.<sup>32</sup> A commercial purpose is defined as "the expectation of financial gain or other consideration from the sale or other transfer of the visual image, sound recording or other physical impression."<sup>33</sup> Like Bono's proposed bill, the PPA allows a person subjected to harassment to file a civil action against a perpetrator. However, unlike the Bono bill, the PPA provides the prevailing party an award for reasonable attorney fees and cost resulting from the litigation.<sup>34</sup>

Senators Dianne Feinstein (D-CA) Orin Hatch (R-UT) and Barbara Boxer (D-CA) introduced the Personal Privacy Protection Act ("PPPA") on May 20, 1998.<sup>35</sup> The PPPA provides enhanced civil and criminal penalties for intrusive newsgathering activities.<sup>36</sup> Congressional findings in support of the Feinstein bill include:

That individuals and their families have been harassed and endangered by being persistently followed or chased in a way that puts them in reasonable fear of bodily injury, and in danger of serious bodily injury or even death, by photographers, videographers, and audio recorders at-

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26. See Pyk, *supra* note 22, at 194.

27. See *id.*

28. See *id.*

29. See *id.* at 195.

30. See Pyk, *supra* note 22, at 195.

31. See *id.*

32. See *id.*

33. See *id.*

34. See *id.*

35. See Pyk, *supra* note 22, at 195.

36. See Morton, *supra* note 21, at 1450.

tempting to capture images or other reproductions of their private lives for commercial purposes. That the legitimate privacy interest of individuals and their families have been violated by photographers, videographers, and audio recorders who physically trespass in order to capture images or other reproductions of their private lives for commercial purposes, or who do so constructively through intrusive modern visual or auditory enhancement devices, such as powerful telephoto lenses and hyperbolic microphones that permit invasion of private areas that would otherwise be impossible without trespassing.<sup>37</sup>

The proposed Feinstein bill would make it a federal crime to attempt to photograph or record a person in a way that risks bodily harm.<sup>38</sup> The penalties under the proposed Feinstein bill are comparable to the penalties imposed under Bono's proposed bill.<sup>39</sup> Analogous to Bono's and Gallego's proposed bills, the fact that no image or recording was captured or sold is not a defense against prosecution.<sup>40</sup>

Feinstein's bill defines the term, harass as:

someone who persistently physically follows or chases a person in a manner that causes the person to have a reasonable fear of bodily injury, in order to capture by, a visual or auditory recording instrument, any type of image, sound recording or other physical impression of the person for commercial purposes.<sup>41</sup>

The term commercial purpose is defined as, "the expectation of sale, financial gain or other consideration."<sup>42</sup>

Finally, akin to the Bono and Gallego proposed bills, there is an exemption for law enforcement activities, yet this bill appears to place more attention on the privacy protection of private individuals whose misfortunes are captured on tape than in the Bono bill.<sup>43</sup>

A companion to Feinstein's PPPA was introduced on August 5, 1998 by Representative John Conyers (D-Michigan) and Bill McCullom (R-FL).<sup>44</sup> The central function of this bill provides protection from personal intrusion for commercial purposes.<sup>45</sup> Under Conyers' proposed bill, federal anti-paparazzi legislation would impose criminal and civil penalties for "reckless endangerment" and civil penalties for "tortious invasion of privacy."<sup>46</sup>

37. S. 2103, 105th Cong. (1997).

38. See generally Rebecca Roiphe, *Anti-Paparazzi Legislation*, 36 HARV. J. LEGIS. 250 (1999).

39. See *id.*

40. See *id.*

41. *Id.*

42. S. 2103, 105th Cong. (1997)

43. See Pyk, *supra* note 22, at 196.

44. See *id.*

45. See *id.*

46. See H.R. 97, 106 Cong. (1999).

The first provision, "reckless endangerment," imposes both criminal and civil penalties on paparazzi photographers and photojournalist who "persistently follow" their subjects in order to obtain footage for commercial purposes.<sup>47</sup> Under the bill, if death or serious bodily injury occurs, an individual can be fined or imprisoned not more than thirty years or both.<sup>48</sup> Additionally, an individual in violation can be liable in a civil action for appropriate relief.<sup>49</sup>

The second provision, "tortious invasion of privacy" would also create a civil cause of action against those who use visual or audio enhancement devices, such as telephoto lenses or high-powered microphones to invade upon one's privacy.<sup>50</sup> 'Tortious invasion of privacy' is specifically defined as the 'capture of any type of visual image, sound recording, or other physical impression of a personal or familial activity through an auditory enhancement device,' if (a) the subject has a reasonable expectation of privacy with respect to that activity and (b) the image, recording, or impression could not have been captured without a trespass if not produced by the use of the enhancement device.<sup>51</sup> None of the proposed federal bills went before either the House of Representatives or the Senate for a vote as to whether they should become the law.

#### IV. CALIFORNIA'S ANTI-PAPARAZZI LAW

The nation's first anti-paparazzi statute was passed in California.<sup>52</sup> The California Civil Code Section 1708.8 holds

[a] person liable for physical invasion of privacy when: (1) the defendant knowingly entered onto the land of another without permission; (2) [entry is made] with the intent to capture any type of visual image, sound recording, or other physical impression of [another] engaging in a 'personal or familial activity;' and (3) the physical invasion is [deemed] offensive to a reasonable person.<sup>53</sup>

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47. See Randall Boese, *Redefining Privacy? Anti-Paparazzi Legislation and Freedom of the Press*, 17 SUM COMM. LAW 1,4 (1999); see also H.R. 97, 106th Cong. (1999) § 1 (A) (specifying liability arises against any person who (1) for commercial purposes, (2) persistently follows or chases a person, (3) in a manner that causes that person to have a reasonable fear of bodily injury, (4) in order to capture by a visual, or auditory recording instrument any type of visual image, sound recording, or other physical impression of that person).

48. See H.R. 97, 106th Cong. (1999) § 2 (A).

49. See Pyk, *supra* note 22, at 197.

50. See H.R. 97, 106th Cong. (1999) § 2 (B); see also Boese, *supra* note 47, at 4 (noting liability may arise against one who (1) for commercial purposes, (2) engages in a "tortious invasion of the privacy" of another person, (3) in order to capture by visual or auditory recording instrument any type of visual image, sound recording, or other physical impression of that person).

51. See H.R. 97, 106th Cong. (1999) § 2(C) (2).

52. See generally Cal. Civ. Code § 1708.8 (West 1998) (California Governor Pete Wilson signed into law the first anti-paparazzi statute in September of 1998).

53. Ca. Civ. Code § 1708.8(a) (West 1998).



The statute further provides that an individual can be held liable for constructive invasion of privacy where a physical trespass did not occur.<sup>54</sup> The California legislature created the "constructive invasion of privacy" tort designed to deal with the modern day paparazzi and their use of high powered technological devices.<sup>55</sup> Under Section 1708.8, a person is liable for constructive invasion of privacy when:

[A] person attempts to capture any type of visual image, sound recording, or other physical impression of the plaintiff; though the use of an enhancement device; while the plaintiff is engaged in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy; and in a manner that is offensive to a reasonable person.<sup>56</sup>

If either a physical or constructive invasion of privacy occurs, the individual responsible may be liable for general, special and treble damages.<sup>57</sup> Additionally, the individual may be liable for punitive damages.<sup>58</sup> If it is proven that the invasion of privacy was for commercial purposes, the remedy is "disgorgement" of any proceeds resulting from violating this section.<sup>59</sup>

California's anti-paparazzi statute also includes a vicarious liability component.<sup>60</sup> Under the statute, any person who "directs, solicits, actually induces, or actually causes another person [to commit an act of trespass or constructive trespass] regardless of whether there is an employee-employer relationship [can be held] liable [under Section 1708.8] for general, special, consequential [and in some instances] punitive damages."<sup>61</sup>

Similar to the proposed federal bills, Section 1708.8 also includes an exemption for law enforcement activities.<sup>62</sup> This provision of the statute holds legitimate:

lawful activit[y] of law enforcement personnel or employees of governmental agencies or other entities, either public or private who, in the course and scope of their employment, and supported by an articulat[e] suspicion, capture[s] a visual image, sound recording or other physical

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54. See Ca. Civ. Code § 1708.8(b) (West 1998) (responding to the use of enhanced recordings).

55. See *Privacy supra* note 2, at 1379 (noting the effort to bring back the privacy protection that physical barriers traditionally provided before the advent of high-powered technological devices).

56. Ca. Civ. Code § 1708.8(b) (West 1998).

57. See Boese, *supra* note 47, at 3 (noting up to three times the amount of any general and special damages that are proximately caused by violating the statute); see also Cal. Civ. Code § 1708.8(c) (West 1998).

58. See Cal. Civ. Code §§ 1708.8(c) and (d) (West 1998).

59. See Cal. Civ. Code § 1708.8(c) (West 1998).

60. See Morton, *supra* note 21, at 1450.

61. Cal. Civ. Code § 1708.8(c) (West 1998).

62. See Pyk, *supra* note 22, at 198.

impression of a person during an investigation, surveillance or monitoring of any conduct to [acquire] evidence of suspected illegal activity, the suspected violation of any administrative rule or regulation, a suspected fraudulent insurance claim, or any other suspected fraudulent conduct or activity involving a violation of law or pattern of business practices adversely affecting the public health or safety.<sup>63</sup>

As stated, it is unclear as to whether police type reality programming would be covered by the aforementioned exemption.

## V. CONSTITUTIONALITY OF ANTI-PAPARAZZI STATUTES

Supporters of anti-paparazzi laws contend that anti-paparazzi statutes do not ban paparazzi photographers from taking pictures of celebrities and public figures.<sup>64</sup> Rather, the supporters contend that the anti-paparazzi laws simply attempt to impose reasonable standards on the manner in which paparazzi photographers obtain their photographs of celebrities and public figures.<sup>65</sup> Additionally, supporters argue that such regulation on the manner in which paparazzi photographers obtain photographs serves an important social benefit by protecting the safety of these individuals and the public.<sup>66</sup> Although, there is no debate that these are vital societal interests in light of the well-publicized incidents over the last two years of celebrities and other public figures being beleaguered by the news media. These statutes go against conventional wisdom that states an individual has no legal recourse against being photographed in a public place.

The reality is that venturing out onto the street makes an individual fair game for cameras, regardless of whether those cameras are obvious and visible, or hidden from the public's view.<sup>67</sup> The reasoning behind this general rule is that taking a person's photograph in public amounts to nothing more than making a record of a public sight that anyone present would be free to see.<sup>68</sup> Accordingly, the constitutionality of these proposed federal bills and the California anti-paparazzi law must be questioned. Therefore, what are some of the test that the courts will look at in examining the constitutionality of these statutes.

One test of the constitutionality of anti-paparazzi statutes is the standard established in *United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien*, when speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental inter-

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63. Cal. Civ. Code § 1708.8(f) (West 1998).

64. See Sharon A. Madere, *Paparazzi Legislation: Policy Arguments and Legal Analysis in Support of their Constitutionality*, 46 UCLA L. REV. 1633, 1640 (1999).

65. See *id.*

66. See *id.*

67. See Prosser, *supra* note 6, at 392 (1960).

68. See *id.*

est in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.<sup>69</sup> A governmental regulation is sufficiently justified under the *O'Brien* standard if:

- it is within the constitutional power of the government;
- it furthers an important or substantial governmental interest;
- if the government interest is unrelated to the suppression of free expression; and
- if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest.<sup>70</sup>

In examining the *O'Brien* standard, there is no dispute that the government has the power if not the duty to enact laws to ensure the health, safety, welfare and privacy of its citizens.<sup>71</sup> Anti-paparazzi statutes seem to further important governmental interests in safety and privacy of citizens. Likewise, it can be argued that this interest is unrelated to the suppression of free expression because paparazzi photographers would still be able to take pictures of celebrities provided such pictures are taken from a safe distance. Finally, one can argue that the burden on the expressive conduct of the paparazzi photographer is no greater than that which is necessary to further an important governmental interest in protecting the safety and privacy of its citizens. Therefore, arguably under the *O'Brien* standard it would appear that a court could find that these anti-paparazzi statutes are constitutional.

Another test of their constitutionality is the "Content Neutral Time, Place or Manner" Test.<sup>72</sup> Under this test, the government is not concerned with the message that is being conveyed.<sup>73</sup> The government's concern under this test is on the method in which the message is being conveyed.<sup>74</sup> A court will apply immediate scrutiny when determining the constitutionality of a content neutral statute if that statute has an incidental effect on First Amendment rights.<sup>75</sup>

As stated earlier, anti-paparazzi statutes support a significant governmental interest in protecting the safety and privacy of its citizens. Moreover, while these statutes may leave alternative channels of communication, in that they are solely aimed at harmful or dangerous conduct, the issue is whether these statutes are narrowly tailored to serve those interests. These statutes broadly apply to all members of the

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69. See *United States v. O'Brien*, 391 U.S. 367 (1968); see also Madere, *supra* note 64, at p. 1660.

70. See *id.* at 377.

71. See *id.*

72. See Madere, *supra* note 64, at 1661.

73. See *id.*

74. See *id.*

75. See *id.* at 1662. To meet this standard, anti-paparazzi statutes must be supported by a significant government interest; narrowly tailored to serve those interests, and leave open ample alternative channels of communication. *Id.*

press, as well as to the fan attempting to obtain a picture of a celebrity. Accordingly, it could be argued that these statutes are not narrowly tailored to its goal of dealing with the abusive paparazzi photographers. Moreover, these statutes may have unintended consequences, which may hinder the ability of the media to do investigative reporting on matters of legitimate public interest that surround public figures.

Additionally, a court can look at these anti-paparazzi statutes to determine whether these statutes are too vague. The United States Supreme Court in *Connally v. General Construction Co.*, 269 U.S. 385 (1926), explained that a statute was vague when people of common intelligence have to guess at its meaning.<sup>76</sup> The *Connally* court held that vagueness violates due process of law and is therefore unconstitutional.<sup>77</sup> A statute must be written clear enough to give people the reasonable opportunity to comprehend what the law requires so that they can ensure that their behavior comports with the statute.<sup>78</sup> The two-prong test established by the United States Supreme Court for vagueness is:

if the ordinary citizen can understand the intended scope of the law; and the law contains detailed standards to preclude arbitrary or capricious enforcement, then the law is not unconstitutionally vague.<sup>79</sup>

An examination of the proposed federal anti-paparazzi bills shows that these bills fail to meet this test. For example, the key phrase "persistently follows" is not defined. Does the phrase refer to the distance that a paparazzi photographer follows his subject? Does it refer to the number of days the paparazzi photographer follows his subject? If a paparazzi photographer follows his subject persistently for a month, is that sufficient to be in violation of the statute? Or if a paparazzi photographer follows his subject persistently every third day of the month for a year, does that qualify under the statute as "persistently follows"? Or is it some combination of the above?

Consequently, the vagueness of the proposed federal anti-paparazzi statutes makes it tricky for paparazzi photographers and legitimate news photographers to know what violates the law. It also makes it difficult for those charged with enforcing the statute to know what conduct is prohibited and whether the law has been violated. Therefore, these bills fail to draw a clear line between what is unlawful behavior and what constitutes reasonable newsgathering.

Another test of the constitutionality of anti-paparazzi statutes is known as the over broad test. Under this test, a law is unconstitutional

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76. See *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

77. See *id.*; see also *Madere*, *supra* note 64, at 1661.

78. See *Connally*, 269 U.S. at 391.

79. See *id.*

if it restricts substantially more speech or conduct than is necessary to accomplish its desired end.<sup>80</sup> California's anti-paparazzi statute broadly defines "personal or familial activity" as intimate details of the person's personal life, interactions with the family or significant others, and other aspects of the person's private affairs or concerns. Therefore, because the definition is so broad that the targets of news reports can argue that almost any activity is private.

The final test of constitutionality was set forth in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). In *Minneapolis Star & Tribune Co.*, the court ruled that Minnesota's enactment of a special use tax applied only to the cost of ink and paper consumed in the production of newspapers violated the First Amendment rights of the plaintiff.<sup>81</sup> The rationale behind the court's decision was that a regulation that treats the press differently carries with it the implicit suggestion that the regulation is based upon a censorial motive.<sup>82</sup> "Differential treatment, unless justified by some special characteristic of the press, suggest that the goal is not unrelated to the suppression of expression, and [as] such [the] goal is presumptively unconstitutional."<sup>83</sup> The test established in *Minneapolis Star* would require that anti-paparazzi laws must be based upon a compelling governmental interest that cannot be achieved without differential treatment.<sup>84</sup>

Since there are other laws aimed at prohibiting the same intrusive and abusive conduct of the paparazzi photographer such as stalking and harassment there is no compelling need for these statutes. By enhancing the enforcement, and in some instances the penalties provided for under existing laws, it would appear that these existing laws would be able to provide celebrities with more than enough protection against the paparazzi. Accordingly, the anti-paparazzi statutes fail to pass the first prong of the *Minneapolis Star* test.

As for the second prong of this test, it is irrational to suggest that a more compelling need exist to prohibit harassment by individuals working for profit than harassment by an overly zealous or obsessive fan. Consequently, it is likely that these anti-paparazzi statutes would also fail this prong of the test, which requires that there be a showing that the compelling interest counterbalances First Amendment concerns cannot be achieved without differential treatment. Consequently, there can be no debate that the goal of prohibiting stalking, harassment, invasions

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80. See Madere, *supra* note 64, at 1667.

81. See *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Rev.*, 460 U.S. 575, 579 (1983).

82. See *id.* at 588.

83. See *id.* at 585.

84. See *id.* at 585-6.

of privacy, assaults, and batteries can be accomplished without these anti-paparazzi statutes that unjustly single out the press.

Nevertheless, even if we are to take for granted that these statutes pass constitutional muster, the question is whether these statutes are even necessary. Though some would argue that these laws are underutilized, there are state and federal laws that are available to celebrities and other public figures that can be used to deal with aggressive paparazzi photographers. In short, these anti-paparazzi statutes are not needed because there are other legal remedies that are available to celebrities.

## VI. LEGAL REMEDIES AVAILABLE AGAINST THE OVERZEALOUS PAPARAZZI

There is no debate that paparazzi behavior goes well beyond the limits of decency. However, when paparazzi photographers endanger public safety or the life of an individual, paparazzi photographers are subject to the same laws and penalties as any other citizen of the United States. Accordingly, there are numerous state and federal statutes that celebrities could avail themselves of in dealing with abusive paparazzi behavior.

Many states have anti-stalking and anti-harassment legislation that affords celebrities legal remedies against overzealous paparazzi photographers.<sup>85</sup> The existence of these laws implies that there is no need for the anti-paparazzi legislation that has been proposed at the federal level and passed by the state of California.<sup>86</sup> Furthermore, all states have common law or statutory prohibitions on harassment, stalking, assault and reckless behavior.<sup>87</sup> Since California's enactment of the nation's first anti-stalking laws, the majority of states have enacted anti-stalking laws.<sup>88</sup>

In Maryland, stalking is defined as "a malicious course of conduct that includes . . . pursuing another person with intent to place that person in reasonable fear . . . of serious bodily injury."<sup>89</sup> Under Maryland's stalking statute, a court can impose a fine of \$5,000 and a maximum prison sentence of five years on an individual found guilty of violating

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85. See Irene L. Kim, *Defending Freedom of Speech: The Unconstitutionality of Anti-Paparazzi Legislation*, 44 S. D. L. REV. 275, 300 (1999).

86. See *id.*

87. See *id.*

88. See Laurie Salame, *A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 SUFFOLK U. L. REV. 66, 67 (1993) (noting the two states, Arizona and Maine utilize their harassment and terrorizing statutes to combat stalking).

89. See Kim, *supra* note 85, at 301.

this statute.<sup>90</sup> California's stalking statute provides:

Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family, is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.<sup>91</sup>

A person who "commits a second or subsequent violation of this section shall be punished by imprisonment in the state prison for two, three, or four years."<sup>92</sup> In addition, a judge under California statute may issue a restraining order prohibiting the stalker from contacting the victim for up to ten years.<sup>93</sup>

Another option for celebrities to protect themselves is an injunction or temporary restraining order (TRO). To obtain a favorable ruling, the plaintiff must show:

(1) the likelihood that the plaintiff will prevail on the merits at trial; (2) the extent to which the plaintiffs will suffer irreparable harm in the absence of an injunction; (3) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest. (citations omitted).<sup>94</sup>

Although states will issue a TRO for a multitude of reasons, the standard of proof for a TRO's issuance is fairly similar, in that, the movant must prove that "irreparable injury" will result if the court does not grant the relief sought.<sup>95</sup>

The most renowned example of a celebrity utilizing injunctive relief against a paparazzi photographer is the Galella v. Onassis case.<sup>96</sup> In *Galella*, a free-lance photographer, filed suit against Jacqueline Onassis alleging that an earlier restraining order by Mrs. Onassis unreasonably interfered with his livelihood.<sup>97</sup> The district court found the restraining order to be valid and Galella in contempt because Galella had "insinuated himself into the very fabric of Mrs. Onassis' life and the challenge to this court is to fashion the tool to get him out."<sup>98</sup>

By clear and convincing evidence, the court found that Galella had

90. *See id.*

91. Cal. Penal Code § 646.9(a) (West 1998).

92. Cal. Penal Code § 646.9(c) (West 1998).

93. *See* Cal. Penal Code § 646.9(k) (West 1998).

94. *Wolfson v. Lewis*, 924 F. Supp. 1413, 1422 (1996).

95. *See Kim, supra* note 85, at 306.

96. *See generally Galella v. Onassis*, 533 F. Supp. 1076 (S.D.N.Y. 1982).

97. *See id.* at 1077.

98. *See id.* at 1108 (quoting *Galella v. Onassis*, 353 F. Supp. 196, 210, 216, 228, 231 (1972)).

violated the TRO on four separate occasions.<sup>99</sup> The first incident occurred on July 21, 1981 at the Hollywood Twin Theatre in Manhattan when the theatre manager "tipped off" the New York Post that Mrs. Onassis was at the movie theater.<sup>100</sup> With the assistance of the manager, Galella was able to physically detain Mrs. Onassis for the purpose of photographing her against her will.<sup>101</sup> The second incident occurred on September 8, 1981, Galella chased Mrs. Onassis across Menemsha Pond in Martha's Vineyard, Massachusetts.<sup>102</sup> When her boat stalled, Galella photographed her against her wishes.<sup>103</sup> A third incident occurred on September 7, 1981 when Galella and several associates for the purpose of taking Mrs. Onassis' daughter's picture ambushed her when she was biking.<sup>104</sup> This was followed by a final incident when Galella harassed Mrs. Onassis and her friends in the lobby of the Winter Garden Theatre in New York City.<sup>105</sup>

The Galella decision is important for three reasons. First, Mrs. Onassis did not, at anytime, seriously dispute Galella's First Amendment right to photograph her and her children.<sup>106</sup> Rather, her concern was that he adheres to the restrictions the court had previously established.<sup>107</sup> Onassis also did not dispute the fact that a photographer has the right to gather newsworthy information of official public interest. In this particular instance, Galella was not acting as "a news photographer . . . endeavoring to get a story, accompanied by photographs, of persons who were, and still are, the object of legitimate public interest."<sup>108</sup> Rather there was no debate that his actions went far beyond "the reasonable bounds" of normal newsgathering.<sup>109</sup> Secondly, the court balanced the importance of the public's right to observe the day-to-day activities of Mrs. Onassis and her children against the continuously intrusive surveillance and abusive behavior of Mr. Galella.<sup>110</sup> This resulted in the court disregarding Galella's contentions that the constitutional freedom of the press protected him from any liability that may arise as a result of his newsgathering methods.<sup>111</sup> The court obviously did not find that endangering the lives of Mrs. Onassis or the young Kennedy children justi-

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99. *See id.* at 1089.

100. *See Galella*, 533 F. Supp. at 1086.

101. *See id.* at 1088.

102. *See id.* at 1089.

103. *See id.*

104. *See Galella*, 533 F. Supp. at 1092.

105. *See id.* at 1096-97.

106. *See id.* at 1105.

107. *See id.*

108. *Id.* at 1105.

109. *See id.*

110. *See Galella*, 533 F. Supp. at 1106.

111. *See id.*



fied the aggressive tactics used by Mr. Galella in the exercise of his First Amendment rights: "Crimes and torts committed in newsgathering are not protected . . . [t]here is no threat to a free press in requiring its agents to act within the law."<sup>112</sup>

Finally, it is also vital to note that the Galella court did not set the specifications of Mrs. Onassis' TRO as the standard for which all such injunctions should follow.<sup>113</sup> The opinion is devoid of any language that would suggest that another public figure or celebrity, in pursuit of their own injunction against a photographer, would have to be held to the same distances or places as specified in the Onassis restraining order.<sup>114</sup> Rather it should be noted that these situations would be handled on a case by case basis.<sup>115</sup> Preliminary injunctions are fact sensitive by nature. Each celebrity will have a different "irreparable injury" than the next, and each celebrity will not always seek an injunction against the same paparazzi photographer.<sup>116</sup> In addition, depending on the nature of the dispute, features as minimum 'distances, specific actions by the plaintiff or defendant, and equipment used will inevitably vary between different injunctions.<sup>117</sup> The court in *Galella* takes care to ensure that a court had wide latitude in tailoring TROs.<sup>118</sup> Since each movant's situation is unique, the TRO must be uniquely tailored to meet their needs.<sup>119</sup>

In *Galella*, the court made sure that the TRO and its enforcement did not infringe upon Galella's constitutional right to free speech.<sup>120</sup> Galella was still free to photograph Mrs. Onassis and her children but at a safe distance.<sup>121</sup> The court made it a point to permit Mr. Galella to continue his profession, as long as he did not harm or harass her or her children.<sup>122</sup> This is evidenced when the court struck down a portion of the originally proposed 1971 order that would have barred Galella "from appropriating defendant's photograph for advertising or trade purposes without [her] consent."<sup>123</sup> Furthermore, the original 1971 restraining order, which required Galella to stay 200 and 100 yards between the Onassis and Galella; were reduced by the court to 100 and 50 yards.<sup>124</sup> This decision was clearly an indication that the court recognized

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112. *See id.* at 1105.

113. *See id.* at 1106.

114. *See id.*

115. *See id.*

116. *See Galella*, 533 F. Supp. at 1078.

117. *See id.* at 1107.

118. *See id.* at 1107

119. *See id.*

120. *See id.* at 1105.

121. *See id.* at 1107.

122. *See id.* at 1079.

123. *Galella*, 533 F. Supp. at 1082.

124. *See id.* at 1083.

Galella's First Amendment right to take pictures of Mrs. Onassis and her family, and went so far as to protect this right in the TRO, while at the same time permitting the defendant to enjoin the plaintiff.<sup>125</sup> But Galella's obvious contempt of the TRO and the danger he imposed upon Mrs. Onassis and Caroline Kennedy, clearly outweighed his right to photograph them.<sup>126</sup> Accordingly, when a paparazzi behavior becomes so dangerous that it compromises a celebrity's safety, this case clearly indicates that there are laws available to the celebrity to combat intrusions upon their privacy by paparazzi photographers.

Supporters of anti-paparazzi statute continue to argue that paparazzi photographers use of high-powered telephonic cameras and microphones point to the need for anti-paparazzi laws. They insist that high-powered devices make it unnecessary for a paparazzi photographer to physically invade the privacy of a celebrity. Although there may be some validity to their claims, a federal judge recently granted relief to a harried family against the use of highly sensitive cameras and microphones that the defendant had used to obtain images and conversations. This relief was granted even though the camera crew remained at all times on a public waterway adjacent to the property.<sup>127</sup>

## VII. CONCLUSION

In closing, recent events clearly illustrate that paparazzi photographers are out of control. Anti-paparazzi statutes proposed at the federal level and enacted by the state of California, while well intentioned are not needed. There are already laws against stalking and harassment currently in affect that celebrities can use to effectively deal with paparazzi photographers who intrude upon their privacy. These laws have already faced and passed the constitutional challenges that California's anti-paparazzi will soon face.

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125. *See id.* at 1106.

126. *See id.*

127. *See Wolfson v. Wilson*, 924 F. Supp. 1413 (April 8, 1996).

